

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAPAG-LLOYD AG,

Plaintiff,

- against -

U.S. OIL TRADING LLC, O.W. BUNKER
GERMANY GMBH, and ING BANK N.V.,

Defendants.

14-cv-9949 (VEC)

U.S. OIL TRADING LLC,

Plaintiff,

- against -

M/V VIENNA EXPRESS, her tackle, boilers,
etc., *in rem*, and M/V SOFIA EXPRESS, her
tackle, boilers, etc., *in rem*,

Defendants.

15-cv-6718 (VEC)

HAPAG-LLOYD AG, as claimant to the
in rem defendant M/V VIENNA EXPRESS,

Third-Party Plaintiff,

- against -

O.W. BUNKER GERMANY GMBH, and
ING BANK N.V.,

Third-Party Defendants.

**O.W. BUNKER GERMANY GMBH'S
LOCAL CIVIL RULE 56.1 STATEMENT OF MATERIAL FACTS**

O.W. Bunker Germany GmbH (“OW Germany”), by and through its undersigned counsel, in support of its Motion for Summary Judgment, respectfully submits that there are no genuine issues to be tried for the following material facts, pursuant to Local Civil Rule 56.1:

1. Hapag-Lloyd Aktiengesellschaft (“Hapag”) is a German corporation headquartered in Hamburg, Germany, and is one of the largest container liner shipping companies in the world with a fleet of 177 vessels as of December 31, 2015. (Declaration of Justin M. Heilig dated May 13, 2016, hereinafter “Heilig Decl.,” ¶ 8, Ex. 6.)

2. OW Germany was a limited liability company headquartered in Hamburg, Germany, and was part of the O.W. Bunker Group, a global network of traders and physical suppliers of marine fuels, i.e., “bunkers.” (Dkt. # 92; Heilig Decl. Ex. 9, Tr. 36:16 – 38:8.)

M/V SEASPAN HAMBURG

3. Hapag was the time charterer of the M/V SEASPAN HAMBURG in October 2014. (Heilig Decl. Ex. 7, Tr. 75:8 – 77:4.)

4. As time charterer, Hapag was responsible for purchasing the bunkers needed to power the M/V SEASPAN HAMBURG. (*Id.*)

5. Hapag’s Purchasing Department was solely responsible for ordering and purchasing fuel oil for vessels owned or chartered by Hapag. (*Id.* at Tr. 17:12-23 & 23:11-14.)

6. No other party was authorized or entitled to purchase fuel oil for vessels owned or chartered by Hapag, including the officers of those vessels. (*Id.* & Declaration of Norbert Kock dated July 27, 2015, hereinafter “Kock Decl.,” 15-cv-6718, Dkt. # 61, ¶ 19.)

7. Hapag's Purchasing Department consisted of five persons located in Hamburg, Germany: four purchasing managers (Lukas Gaus, Nikolai Doerner, Dorit Niemeyer, Ana Dubois) and a director (Norbert Kock). (Heilig Decl. Ex. 7, Tr. 20:12 – 21:22.)

8. On October 8, 2014, Hapag's Purchasing Department received a bunker requisition form by email from the Master of the M/V SEASPAN HAMBURG, requesting a delivery of 2,900 metric tons of bunker fuel at the Port of Tacoma, Washington on October 16, 2014. (*Id.* Ex. 7, Tr. 77:19 – 78:15 & Ex. 11; Kock Decl. ¶ 4.)

9. The Master did not have authority from Hapag to (a) communicate directly with bunker traders or suppliers, or (b) negotiate or alter the terms of a bunker sales contract between Hapag and a trader or supplier. (Heilig Decl. Ex. 7, Tr. 144:18 – 145:21.)

10. Thereafter, Mr. Gaus circulated an email by Bcc: (blind carbon copy) to a selection of potential counterparties on October 9, 2014, to solicit bids for the spot purchase and supply of 2,900 metric tons of bunker fuel to the M/V SEASPAN HAMBURG at either the Port of Tacoma, Oakland, or Los Angeles. (*Id.* Ex. 7, Tr. 78:19 – 80:2 & Ex. 12; Kock Decl. ¶ 5.)

11. The recipients of Hapag's solicitation for bids included OW Germany, as well as other traders in competition with OW Germany, such as Peninsula Petroleum Limited ("Peninsula"), Chemoil Energy Limited ("Chemoil"), and GEFO Gesellschaft für Oeltransporte mbH ("GEFO"). (Heilig Decl. Ex. 7, Tr. 52:15 – 53:12, 84:4-12, 150:4-7.)

12. As a prerequisite to doing business with Hapag, a trader was required to consent to the application of Hapag's Marine Fuel Oil Terms & Conditions of Purchase ("Hapag's Terms") to

any bunker sales contract between Hapag as buyer and the trader as seller. (*Id.* Ex. 7, Tr. 61:14 – 62:22; Ex. 9, Tr. 113:21 – 114:16 & 117:5-25; Ex. 10, Tr. 50:9-15, 54:10-19, 79:21 – 80:20.)

13. In order to do business with Hapag, OW Germany consented and agreed to the application of Hapag's Terms to the parties' bunker sales contracts. (*Id.*)

14. U.S. Oil Trading LLC ("USOT") did not have an account or direct business relationship with Hapag in October 2014. (*Id.* Ex. 7, Tr. 69:9-11 & 109:22-25.)

15. USOT did not receive the solicitation to bid on the supply of bunker fuel to M/V SEASPAN HAMBURG from Hapag. (*Id.* Ex. 7, Tr. 69:9-11 & 109:22-25; Ex. 8, Tr. 38:6 – 39:13.)

16. To bid on the contract for the supply of bunkers to the M/V SEASPAN HAMBURG at a port on the U.S. West Coast, OW Germany requested quotations from O.W. Bunker USA Inc. ("OW USA") in Houston, Texas for the volume and grade of fuel specified in Hapag's email solicitation. (*Id.* Ex. 13.)

17. OW USA was in charge of bunker procurement in the Americas for the O.W. Bunker Group, and OW USA's Houston office served as the sourcing or purchase center for all U.S. ports. (*Id.* Ex. 9, Tr. 95:15-24 & Ex. 10, Tr. 71:23 – 72:5.)

18. OW USA contacted physical suppliers at the Ports of Tacoma, Oakland, and Los Angeles, including USOT, Tesoro Corporation ("Tesoro"), and Phillips 66 Company ("P66"), to obtain the "typicals" specified in OW Germany's bid to Hapag. (*Id.* Ex. 8, Tr. 71:15 – 72:4; Ex. 10, Tr. 57:21 – 59:23; Ex. 14.)

19. Hapag did not instruct OW Germany or OW USA to use USOT or any other entity for the supply of bunker fuel to vessels calling at the Port of Tacoma, and did not control the selection of a physical supplier. (*Id.* Ex. 7, Tr. 58:7-13 & 141:12-22; Kock Decl. ¶ 14.)

20. Hapag did not have any knowledge of the communications, instructions, or agreements between OW Germany and OW USA or between USOT and OW USA concerning the supply of bunker fuel to Hapag's vessels. (Heilig Decl. Ex. 7, Tr. 138:3-8 & Ex. 8, Tr. 39:9-13; Kock Decl. ¶¶ 14-15.)

21. On October 10, 2014, a bunker trader at OW Germany, Karl Heinz Selmer, emailed Lukas Gaus at Hapag with a list of fuel specifications or "typicals" for potential deliveries or "stems" at the Ports of Tacoma, Oakland, and Los Angeles. (Heilig Decl. Ex. 7, Tr. 78:19 – 80:2 & Ex. 15.)

22. To evaluate the bids for the supply of bunker fuel to the M/V SEASPAN HAMBURG at either the Port of Tacoma, Oakland, or Los Angeles, Hapag's Purchasing Department created an internal chart that compared the prices and fuel specifications received from the prospective sellers, including OW Germany. (*Id.* Ex. 7, Tr. 80:5 – 84:16 & Ex. 16.)

23. Hapag did not necessarily award supply contracts to bidders offering the lowest sales prices. Instead, Hapag's comparison chart calculated a total weighted cost that factored in the energy contents from the fuel specifications in order to identify the bunker stem with the best quality at the lowest price. (*Id.* Ex. 7, Tr. 80:5 – 84:16 & 149:24 – 153:19; Ex. 10, Tr. 60:18 – 61:4; Kock Decl. ¶ 5.)

24. Hapag accepted OW Germany's bid to supply the M/V SEASPAN HAMBURG at the Port of Tacoma and confirmed the order at first by telephone. (Heilig Decl. Ex. 7, Tr. 63:2 – 64:21 & 82:17-22.)

25. Hapag agreed to purchase the specified bunker fuel from OW Germany at a price of \$523 per metric ton. (*Id.* Exs. 16 & 18.)

26. Hapag placed its bunker order with OW Germany; it did not contract with OW USA, O.W. Bunker & Trading A/S (“OWT”), or USOT to supply the M/V SEASPAN HAMBURG with bunker fuel.¹ (*Id.* Ex. 7, Tr. 26:16 – 27:5, 135:14-18, 145:19-21, 158:9-11; Ex. 8, Tr. 66:25 – 67:17; Kock Decl. ¶¶ 7-8.)

27. Thereafter, OW Germany issued a written sales order confirmation to Hapag by email on October 10, 2014, identifying the “Seller” as OW Germany and the “Account” as the “Master and/or Owner and/or Charterers and/or M/V SEASPAN HAMBURG and/or Hapag-Lloyd AG.” (Heilig Decl. Ex. 7, Tr. 85:2-11 & Ex. 18.)

28. In the normal course of business, USOT did *not* receive the sales order confirmations issued by OW Germany to Hapag. (*Id.* Ex. 8, Tr. 89:5 – 92:20.)

29. As a result of problems in the past, Hapag did not utilize brokers to purchase bunker fuel. (*Id.* Ex. 7, Tr. 136:2 – 137:11; Kock Decl. ¶¶ 9-10.)

30. Hapag never authorized or appointed OW Germany or OW USA as agents to order bunker fuel on Hapag's behalf. (Heilig Decl. Ex. 7, Tr. 138:19 – 139:5; Kock Decl. ¶ 16.)

¹ Throughout its motion papers, OW Germany refers to O.W. Bunker A/S as “OW Denmark” and to O.W. Bunker & Trading A/S as “OWT.” Both are Danish entities. *See* OW Germany's Rule 7.1 Statement [14-cv-9949, Dkt. # 92].

31. Hapag never advised USOT that OW Germany or OW USA would be acting as Hapag's agents for the purchase of bunker fuel. (Heilig Decl. Ex. 7, Tr. 138:19 – 139:5 & Ex. 8, Tr. 69:10-15; Kock Decl. ¶ 16.)

32. OW Germany acted as a “trader” or “reseller” that purchased bunker fuel in its own name and for its own account to then sell to Hapag as a contractual supplier. (Heilig Decl. Ex. 9, Tr. 37:19 – 39:15 & Ex. 10, Tr. 82:9-24; Kock Decl. ¶ 16.)

33. OW Germany did not act as a “broker” to facilitate sales transactions between Hapag and USOT. (Heilig Decl. Ex. 7, Tr. 132:10 – 135:24 & Ex. 10, Tr. 82:9-24; Kock Decl. ¶¶ 5, 8-9, & fn. 1-2.)

34. On October 10, 2014, Hapag issued a purchase order to OW Germany for the bunkers supplied to the M/V SEASPAN HAMBURG, identifying the “Seller” as OW Germany and the “Account” as Hapag. (Heilig Decl. Ex. 17.)

35. In the normal course of business, USOT did *not* receive the bunker purchase orders issued by Hapag to OW Germany. (*Id.* Ex. 8, Tr. 89:5 – 92:20.)

36. To fulfill its contract with Hapag for the supply of bunker fuel to M/V SEASPAN HAMBURG at the Port of Tacoma, OW Germany then subcontracted to purchase the bunkers from OW USA. (*Id.* Ex. 10, Tr. 71:23 – 73:23; Exs. 19 & 20.)

37. Part of OW Germany's business as a trader or reseller was to sell bunker fuel to its customer first and then seek to buy from the local market at the best possible price. (*Id.* Ex. 9, Tr. 82:8-10.)

38. As affiliated entities within the O.W. Bunker Group, OW Germany and OW USA shared sales information pursuant to an open-book principle as part of their business model. (*Id.* Ex. 9, Tr. 82:11 – 84:6 & Ex. 10, Tr. 30:18 – 31:17.)

39. Thus, on October 10, 2014, *after* entering into a contract with Hapag, Karl Heinz Selmer of OW Germany advised Kai Zhou of OW USA that OW Germany had sold to Hapag at a price of \$523 per metric ton, and requested that OW USA purchase the bunker stem offered by USOT. (*Id.* Ex. 29 at OWG 503.)

40. Thereafter, Mr. Zhou at OW USA negotiated to purchase the bunker stem offered by USOT at a price of \$519 per metric ton. (*Id.* Ex. 29 at OWG 502.)

41. On October 10, 2014, OW Germany issued a purchase order confirmation to OW USA, stating that the bunkers were being purchased for the “Account” of OW Germany. (*Id.* Ex. 19.)

42. On October 10, 2014, OW USA issued a sales order confirmation to OW Germany for the bunker supplied to the M/V SEASPAN HAMBURG, identifying the “Seller” as OW USA. (*Id.* Ex. 20.)

43. On October 10, 2014, OW USA also issued a purchase order confirmation to USOT, stating that the bunkers were being purchased for the “Account” of OW USA. (*Id.* Ex. 8, Tr. 52:22 – 54:14 & Ex. 21.)

44. USOT did not receive any purchase order from OWT in connection with the supply of bunkers to the M/V SEASPAN HAMBURG. (*Id.*)

45. Yet, USOT issued a sales confirmation identifying OWT as the “Buyer” of the bunkers to be delivered to the M/V SEASPAN HAMBURG. (*Id.* Ex. 22.)

46. On October 13, 2014, Hapag issued a revised purchase order to OW Germany to correct the M/V SEASPAN HAMBURG’s estimated time of arrival at the Port of Tacoma. (*Id.* Ex. 17.)

47. On October 16, 2014, a total of 2,900.21 metric tons of bunker fuel were delivered to the M/V SEASPAN HAMBURG by barge at the Port of Tacoma. (*Id.* Ex. 7, tr. 86:23 – 87:9 & Ex. 23.)

48. The barge that delivered the fuel was chartered to USOT, but operated by Olympic Tug & Barge (“OTB”). (*Id.* Ex. 8, Tr. 52:6-15 & 74:21 – 75:18.)

49. After the bunker fuel was loaded onboard the vessel, a bargeman employed by OTB presented a bunker delivery receipt to the Chief Engineer of the M/V SEASPAN HAMBURG for signature. (*Id.* Ex. 8, Tr. 74:21 – 75:18.)

50. The Chief Engineer signed and stamped the bunker delivery receipt to confirm the volume and temperature of the fuel received by the vessel. (*Id.* Ex. 7, Tr. 145:22 – 146:2 & Ex. 23.)

51. The Master of the M/V SEASPAN HAMBURG emailed a copy of the signed bunker delivery receipt to Hapag’s Purchasing Department on October 17, 2014. (*Id.* Ex. 7, Tr. 86:23 – 87:9 & Ex. 23.)

52. USOT issued an invoice for the bunkers delivered to the M/V SEASPAN HAMBURG, dated October 16, 2014, which identified the “Account” as OWT. (*Id.* Ex. 26.)

53. USOT extended a line of credit to OWT based on a review of the O.W. Bunker Group financial statements and credit application. (*Id.* Ex. 8, Tr. 29:5 – 31:22.)

54. USOT considered OWT to be its customer based on the extension of such credit, even though USOT neither communicated with nor received a purchase order from OWT in connection with the supply of bunker fuel to the M/V SEASPAN HAMBURG. (*Id.* Ex. 8, Tr. 54:10-14, 71:3 – 72:4.)

55. USOT did not invoice Hapag for the bunkers delivered to the M/V SEASPAN HAMBURG. (*Id.* Ex. 7, Tr. 69:9-14 & 128:24 – 129:10; Ex. 8, Tr. 38:6-10; Kock Decl. ¶ 20.)

56. On October 27, 2014, OW Germany issued an invoice to Hapag in the amount of \$1,516,809.83 for the supply of bunker fuel to the M/V SEASPAN HAMBURG. (Heilig Decl. Ex. 24.)

57. In the normal course of business, Hapag would remit payment to OW Germany as its contractual counterparty. (*Id.* Ex. 7, Tr. 67:20 – 68:3 & 128:5-23.)

58. However, due to the collapse of the O.W. Bunker Group and the commencement of insolvency proceedings by OW Germany, Hapag did not remit payment to OW Germany for the bunkers supplied to the M/V SEASPAN HAMBURG. (*Id.* Ex. 7, Tr. 67:20 – 68:3 & 89:10-22; Kock Decl. ¶ 20.)

59. On October 28, 2014, OW USA issued an invoice to OW Germany for the supply of bunker fuel to the SEASPAN HAMBURG. (*Id.* Ex. 25.)

M/V SOFIA EXPRESS

60. The manner in which the bunkers were ordered and supplied to the M/V SEASPAN HAMBURG (set forth above) was essentially the same for the M/V SOFIA EXPRESS. (*Id.* Ex. 7, Tr. 67:20 – 68:15 & 142:23 – 143:7; Ex. 8, Tr. 54:10-14.)

61. Hapag owned and operated the M/V SOFIA EXPRESS in October 2014. (*Id.* Ex. 7, Tr. 91:14-21 & 198:14-16.)

62. On October 20, 2014, Hapag's Purchasing Department received a bunker requisition form by email from the Master of the M/V SOFIA EXPRESS, requesting a delivery of 2,700 metric tons of bunker fuel at the Port of Tacoma, Washington on October 29, 2014. (*Id.* Ex. 7, Tr. 91:10-13 & Ex. 11.)

63. The Master did not have authority from Hapag to (a) communicate directly with bunker traders or suppliers, or (b) negotiate or alter the terms of a bunker sales contract between Hapag and a trader or supplier. (*Id.* Ex. 7, Tr. 144:18 – 145:21.)

64. Thereafter, Mr. Gaus circulated an email by Bcc: (blind carbon copy) to a selection of potential counterparties on October 22, 2014, to solicit bids for the spot purchase and supply of 2,700 metric tons of bunker fuel to the M/V SOFIA EXPRESS at the Port of Tacoma. (*Id.* Ex. 12.)

65. To bid on the contract for the supply of bunkers to the M/V SOFIA EXPRESS at the Port of Tacoma, OW Germany requested quotations from OW USA for the volume and grade of fuel specified in Hapag's email solicitation. (*Id.* Ex. 13.)

66. OW USA contacted physical suppliers at the Port of Tacoma, including USOT, Tesoro, and P66, to obtain the “typicals” specified in OW Germany’s bid to Hapag. (*Id.* Ex. 8, Tr. 71:15 – 72:4; Ex. 10, Tr. 57:21 – 59:23; Ex. 14.)

67. Hapag accepted OW Germany’s bid to supply the M/V SOFIA EXPRESS at the Port of Tacoma. (*Id.* Ex. 7, Tr. 92:5-20; Ex. 17.)

68. Hapag agreed to purchase the specified bunker fuel from OW Germany at a price of \$492 per metric ton. (*Id.* Ex. 17.)

69. Hapag placed its bunker order with OW Germany; it did not contract with OW USA, OWT, or USOT to supply the M/V SOFIA EXPRESS with bunker fuel. (*Id.* Ex. 7, Tr. 26:16 – 27:5, 135:14-18, 145:19-21, 158:9-11; Ex. 8, Tr. 66:25 – 67:17; Kock Decl. ¶¶ 7-8.)

70. Thereafter, OW Germany issued a written sales order confirmation to Hapag by email on October 23, 2014, identifying the “Seller” as OW Germany and the “Account” as the “Master and/or Owner and/or Charterers and/or M/V SOFIA EXPRESS and/or Hapag-Lloyd AG.” (Heilig Decl. Ex. 18.)

71. On October 23, 2014, Hapag issued a purchase order to OW Germany for the bunkers supplied to the M/V SOFIA EXPRESS, identifying the “Seller” as OW Germany and the “Account” as Hapag. (*Id.* Ex. 17.)

72. To fulfill its contract with Hapag for the supply of bunker fuel to M/V SOFIA EXPRESS at the Port of Tacoma, OW Germany then subcontracted to purchase the bunkers from OW USA. (*Id.* Ex. 10, Tr. 71:23 – 73:23; Exs. 19 & 20.)

73. OW USA negotiated to purchase the bunker stem offered by USOT at a price of \$490 per metric ton. (*Id.* Ex. 21.)

74. On October 23, 2014, OW Germany issued a purchase order confirmation to OW USA, stating that the bunkers were being purchased for the “Account” of OW Germany. (*Id.* Ex. 19.)

75. On October 23, 2014, OW USA issued a sales order confirmation to OW Germany, identifying the “Seller” as OW USA. (*Id.* Ex. 20.)

76. On October 23, 2014, OW USA also issued a purchase order confirmation to USOT, stating that the bunkers were being purchased for the “Account” of OW USA. (*Id.* Ex. 21.)

77. USOT did not receive any purchase order from OWT in connection with the supply of bunkers to the M/V SOFIA EXPRESS. (*Id.* Ex. 8, Tr. 52:22 – 54:14.)

78. Yet, USOT issued a sales confirmation identifying OWT as the “Buyer” of the bunkers to be delivered to the M/V SOFIA EXPRESS. (*Id.* Ex. 22.)

79. On October 29, 2014, a total of 2,680.22 metric tons of bunker fuel were delivered to the M/V SOFIA EXPRESS by barge at the Port of Tacoma. (*Id.* Ex. 7, Tr. 93:2-5 & Ex. 23.)

80. After the bunker fuel was loaded onboard the vessel, a bargeman employed by OTB presented a bunker delivery receipt to the Master of the M/V SOFIA EXPRESS for signature. (*Id.* Ex. 8, Tr. 74:21 – 75:18.)

81. The Master signed and stamped the bunker delivery receipt to confirm the volume and temperature of the fuel received by the vessel. (*Id.* Ex. 7, Tr. 145:22 – 146:2 & Ex. 23.)

82. The Master of the M/V SOFIA EXPRESS emailed a copy of the signed bunker deliver receipt to Hapag's Ship Management Department on October 29, 2014. (*Id.* Ex. 7, Tr. 93:6-15 & Ex. 23.)

83. USOT issued an invoice for the bunkers delivered to the M/V SOFIA EXPRESS, dated October 29, 2014, which identified the "Account" as OWT. (*Id.* Ex. 26.)

84. USOT did not invoice Hapag for the bunkers delivered to the M/V SOFIA EXPRESS. (*Id.* Ex. 7, Tr. 69:9-14 & 128:24 – 129:10; Ex. 8, Tr. 38:6-10; Kock Decl. ¶ 20.)

85. OW Germany issued an invoice to Hapag dated November 1, 2014 in the amount of \$1,318,668.24 for the supply of bunker fuel to the M/V SOFIA EXPRESS. (Heilig Decl. Ex. 24.)

86. Due to the collapse of the O.W. Bunker Group and the commencement of insolvency proceedings by OW Germany, Hapag did not remit payment to OW Germany for the bunkers supplied to the M/V SOFIA EXPRESS. (*Id.* Ex. 7, Tr. 67:20 – 68:3 & 89:10-22; Kock Decl. ¶ 20.)

87. On November 5, 2014, OW USA issued an invoice to OW Germany for the supply of bunker fuel to the SOFIA EXPRESS. (Heilig Decl. Ex. 25.)

88. On November 5, 2014, Hapag submitted a claim to OW Germany for a short delivery of 13.759 metric tons to the M/V SOFIA EXPRESS, based on a discrepancy between the fuel density recorded on the bunker delivery receipt and a subsequent fuel sample analysis. (*Id.* Ex. 7, Tr. 95:2 – 96:12 & Ex. 30.)

89. Hapag did not submit the short delivery claim to USOT because Hapag did not have a contractual relationship with USOT. (*Id.*)

M/V VIENNA EXPRESS

90. The manner in which the bunkers were ordered and supplied to the M/V SEASPAN HAMBURG and M/V SOFIA EXPRESS (set forth above) was essentially the same for the M/V VIENNA EXPRESS. (*Id.* Ex. 7, Tr. 67:20 – 68:15 & 142:23 – 143:7; Ex. 8, Tr. 54:10-14.)

91. Hapag owned and operated the M/V VIENNA EXPRESS in October 2014. (*Id.* Ex. 7, Tr. 22:24 – 23:3 & 198:14-16.)

92. On October 8, 2014, Hapag's Purchasing Department received a bunker requisition form by email from the Master of the M/V VIENNA EXPRESS, requesting a delivery of 2,700 metric tons of bunker fuel at the Port of Tacoma, Washington. On October 16, 2014. (*Id.* Ex. 11; Kock Decl. ¶ 11.)

93. The Master did not have authority from Hapag to (a) communicate directly with bunker traders or suppliers, or (b) negotiate or alter the terms of a bunker sales contract between Hapag and a trader or supplier. (Heilig Decl. Ex. 7, Tr. 144:18 – 145:21.)

94. Thereafter, Ms. Niemeyer at Hapag circulated an email by Bcc: (blind carbon copy) to a selection of potential counterparties on October 8, 2014, to solicit bids for the spot purchase and supply of 2,700 metric tons of bunker fuel to the M/V VIENNA EXPRESS at the Port of Tacoma. (*Id.* Ex. 12.)

95. To bid on the contract for the supply of bunkers to the M/V VIENNA EXPRESS at the Port of Tacoma, OW Germany requested quotations from OW USA for the volume and grade of fuel specified in Hapag's email solicitation. (*Id.* Ex. 13.)

96. OW USA contacted physical suppliers at the Port of Tacoma, including USOT, Tesoro, and P66, to obtain the "typicals" specified in OW Germany's bid to Hapag. (*Id.* Ex. 8, Tr. 71:15 – 72:4; Ex. 10, Tr. 57:21 – 59:23; Ex. 14.)

97. On October 9, 2014, Karl Heinz Selmer at OW Germany emailed Dorit Niemeyer at Hapag with a list of fuel specifications or "typicals" for potential deliveries or "stems" at the Port of Tacoma. (*Id.* Ex. 15.)

98. Hapag accepted OW Germany's bid to supply the M/V VIENNA EXPRESS at the Port of Tacoma. (*Id.* Ex. 7, Tr. 97:2-22 & Ex. 17.)

99. Hapag agreed to purchase the specified bunker fuel from OW Germany at a price of \$528 per metric ton. (*Id.* Ex. 17.)

100. Hapag placed its bunker order with OW Germany; it did not contract with OW USA, OWT, or USOT to supply the M/V VIENNA EXPRESS with bunker fuel. (*Id.* Ex. 7, Tr. 26:16 – 27:5, 135:14-18, 145:19-21, 158:9-11; Ex. 8, Tr. 66:25 – 67:17; Kock Decl. ¶¶ 7-8.)

101. Thereafter, OW Germany issued a written sales order confirmation to Hapag by email on October 9, 2014, identifying the "Seller" as OW Germany and the "Account" as the "Master and/or Owner and/or Charterers and/or M/V VIENNA EXPRESS and/or Hapag-Lloyd AG." (Heilig Decl. Ex. 18; Kock Decl. ¶ 13.)

102. On October 9, 2014, Hapag issued a purchase order to OW Germany for the bunkers supplied to the M/V VIENNA EXPRESS, identifying the “seller” as OW Germany and the “account” as Hapag. (Heilig Decl. Ex. 7, Tr. 98:3-13 & Ex. 17; Kock Decl. ¶ 13.)

103. To fulfill its contract with Hapag for the supply of bunker fuel to M/V VIENNA EXPRESS at the Port of Tacoma, OW Germany then subcontracted to purchase the bunkers from OW USA. (Heilig Decl. Ex. 10, Tr. 71:23 – 73:23; Exs. 19 & 20.)

104. OW USA negotiated to purchase the bunker stem offered by USOT at a price of \$521 per metric ton. (*Id.* Ex. 21.)

105. On October 9, 2014, OW Germany issued a purchase order confirmation to OW USA, stating that the bunkers were being purchased for the “Account” of OW Germany. (*Id.* Ex. 19.)

106. On October 9, 2014, OW USA issued a sales order confirmation to OW Germany for the bunkers supplied to the M/V VIENNA EXPRESS, identifying the “Seller” as OW USA. (*Id.* Ex. 20.)

107. On October 9, 2014, OW USA also issued a purchase order confirmation to USOT, stating that the bunkers were being purchased for the “Account” of OW USA. (*Id.* Ex. 21.)

108. USOT did not receive any purchase order from OWT in connection with the supply of bunkers to the M/V VIENNA EXPRESS. (*Id.* Ex. 8, Tr. 52:22 – 54:14.)

109. Yet, USOT issued a sales confirmation identifying OWT as the “Buyer” of the bunkers to be delivered to the M/V VIENNA EXPRESS. (*Id.* Ex. 22.)

110. On October 18, 2014, a total of 2,710.93 metric tons of bunker fuel were delivered to the M/V VIENNA EXPRESS by barge at the Port of Tacoma. (*Id.* Ex. 23.)

111. After the bunker fuel was loaded onboard the vessel, a bargeman employed by OTB presented a bunker delivery receipt to the Chief Engineer of the M/V VIENNA EXPRESS for signature. (*Id.* Ex. 8, Tr. 74:21 – 75:18.)

112. The Chief Engineer signed and stamped the bunker delivery receipt to confirm the volume and temperature of the fuel received by the vessel. (*Id.* Ex. 7, Tr. 145:22 – 146:2 & Ex. 23; Kock Decl. ¶ 18.)

113. The Chief Engineer emailed a copy of the signed bunker deliver receipt to Hapag's Purchasing and Ship Management Departments on October 19, 2014. (Heilig Decl. Ex. 23.)

114. USOT issued an invoice for the bunkers delivered to the M/V VIENNA EXPRESS, dated October 18, 2014, which identified the "Account" as OWT. (*Id.* Ex. 26.)

115. USOT did not invoice Hapag for the bunkers delivered to the M/V VIENNA EXPRESS. (*Id.* Ex. 7, Tr. 69:9-14 & 128:24 – 129:10; Ex. 8, Tr. 38:6-10; Kock Decl. ¶ 20.)

116. On October 28, 2014, OW USA issued an invoice to OW Germany for the supply of bunker fuel to the M/V VIENNA EXPRESS. (Heilig Decl. Ex. 25.)

117. On October 29, 2014, OW Germany issued an invoice to Hapag in the amount of \$1,431,371.04 for the supply of bunker fuel to the M/V VIENNA EXPRESS. (*Id.* Ex. 24.)

118. Due to the collapse of the O.W. Bunker Group and the commencement of insolvency proceedings by OW Germany, Hapag did not remit payment to OW Germany for the bunkers supplied to the M/V VIENNA EXPRESS. (*Id.* Ex. 7, Tr. 67:20 – 68:3 & 89:10-22; Kock Decl. ¶ 20.)

M/V SANTA ROBERTA

119. The manner in which the bunkers were ordered and supplied to the M/V SEASPAN HAMBURG, M/V SOFIA EXPRESS, and VIENNA EXPRESS (set forth above) was essentially the same for the M/V SANTA ROBERTA. (*Id.* Ex. 7, Tr. 67:20 – 68:15 & 142:23 – 143:7; Ex. 8, Tr. 54:10-14.)

120. Hapag was the time charterer of the M/V SANTA ROBERTA in October 2014. (*Id.* Ex. 7, Tr. 40:19 – 41:2.)

121. As time charterer, Hapag was responsible for purchasing the bunkers needed to power the M/V SANTA ROBERTA. (*Id.*)

122. On September 26, 2014, Hapag's Purchasing Department received a bunker requisition form by email from the Master of the M/V SANTA ROBERTA, requesting a delivery of 2,700 metric tons of heavy fuel oil ("HFO") at the Port of Tacoma, Washington. On October 8, 2014. (*Id.* Ex. 11.)

123. The Master did not have authority from Hapag to (a) communicate directly with bunker traders or suppliers, or (b) negotiate or alter the terms of a bunker sales contract between Hapag and a trader or supplier. (*Id.* Ex. 7, Tr. 144:18 – 145:21.)

124. Thereafter, Lukas Gaus at Hapag circulated an email by Bcc: (blind carbon copy) with a “Bunker Fuel Inquiry” form to a selection of potential counterparties on September 30, 2014, to solicit bids for the spot purchase and supply of 2,700 metric tons of bunker fuel to the M/V SANTA ROBERTA at either the Port of Tacoma, Oakland, or Los Angeles. (*Id.* Ex. 12.)

125. To bid on the contract for the supply of bunkers to the M/V SANTA ROBERTA at a port on the U.S. West Coast, OW Germany requested quotations from OW USA for the volume and grade of fuel specified in Hapag’s email solicitation. (*Id.* Ex. 13.)

126. OW USA contacted physical suppliers at the Ports of Tacoma, Oakland, and Los Angeles, including USOT, Tesoro, and P66, to obtain the “typicals” specified in OW Germany’s bid to Hapag. (*Id.* Ex. 8, Tr. 71:15 – 72:4; Ex. 10, Tr. 57:21 – 59:23; Ex. 14.)

127. On October 1, 2014, Karl Heinz Selmer at OW Germany emailed Lukas Gaus at Hapag with a list of fuel specifications or “typicals” for potential deliveries or “stems” at the Ports of Tacoma, Oakland, and Los Angeles. (*Id.* Ex. 15.)

128. Hapag accepted OW Germany’s bid to supply the M/V SANTA ROBERTA with 2,700 metric tons of HFO at the Port of Tacoma. (*Id.* Ex. 7, Tr. 56:20 – 57:3 & Ex. 17.)

129. Hapag agreed to purchase the specified bunker fuel from OW Germany at a price of \$554 per metric ton. (*Id.* Ex. 17.)

130. Hapag placed its bunker order with OW Germany; it did not contract with OW USA, OWT, or USOT to supply the M/V SANTA ROBERTA with bunker fuel. (*Id.* Ex. 7, Tr. 26:16 – 27:5, 135:14-18, 145:19-21, 158:9-11; Ex. 8, Tr. 66:25 – 67:17; Kock Decl. ¶¶ 7-8.)

131. Thereafter, OW Germany issued a written sales order confirmation to Hapag by email on October 1, 2014, identifying the “Seller” as OW Germany and the “Account” as the “Master and/or Owner and/or Charterers and/or M/V SANTA ROBERTA and/or Hapag-Lloyd AG.” (Heilig Decl. Ex. 7, Tr. 57:4-25 & Ex. 18.)

132. On October 1, 2014, Hapag issued a purchase order to OW Germany for the bunkers supplied to the M/V SANTA ROBERTA, identifying the “seller” as OW Germany and the “account” as Hapag. (*Id.* Ex. 7, Tr. 63:2-13 & Ex. 17.) (NK 63; HPL 151)

133. To fulfill its contract with Hapag for the supply of bunker fuel to M/V SANTA ROBERTA at the Port of Tacoma, OW Germany then subcontracted to purchase the bunkers from OW USA. (*Id.* Ex. 10, Tr. 71:23 – 73:23; Exs. 19 & 20.)

134. OW USA negotiated to purchase the bunker stem offered by USOT at a price of \$548 per metric ton. (*Id.* Ex. 21.)

135. On October 1, 2014, OW Germany issued a purchase order confirmation to OW USA, stating that the bunkers were being purchased for the “Account” of OW Germany. (*Id.* Ex. 19.)

136. On October 1, 2014, OW USA issued a sales order confirmation to OW Germany for the bunkers supplied to the M/V SANTA ROBERTA, identifying the “Seller” as OW USA. (*Id.* Ex. 20.)

137. On October 1, 2014, OW USA also issued a purchase order confirmation to USOT, stating that the bunkers were being purchased for the “Account” of OW USA. (*Id.* Ex. 21.)

138. USOT did not receive any purchase order from OWT in connection with the supply of bunkers to the M/V SANTA ROBERTA. (*Id.* Ex. 8, Tr. 52:22 – 54:14.)

139. Yet, USOT issued a sales confirmation identifying OWT as the “Buyer” of the bunkers to be delivered to the M/V SEASPAN HAMBURG. (*Id.* Ex. 22.)

140. On October 9, 2014, a total of 2,700.11 metric tons of bunker fuel were delivered to the M/V SANTA ROBERTA by barge at the Port of Tacoma. (*Id.* Ex. 23.)

141. After the bunker fuel was loaded onboard the vessel, a bargeman employed by OTB presented a bunker delivery receipt to the Chief Engineer of the M/V SANTA ROBERTA for signature. (*Id.* Ex. 8, Tr. 74:21 – 75:18.)

142. The Chief Engineer signed and stamped the bunker delivery receipt to confirm the volume and temperature of the fuel received by the vessel. (*Id.* Ex. 7, Tr. 145:22 – 146:2 & Ex. 23.)

143. The Chief Engineer emailed a copy of the signed bunker deliver receipt to Hapag’s Purchasing Department on October 10, 2014. (*Id.* Ex. 7, Tr. 69:18-24 & Ex. 23.)

144. USOT issued an invoice for the bunkers delivered to the M/V SANTA ROBERTA, dated October 9, 2014, which identified the “Account” as OWT. (*Id.* Ex. 26.)

145. USOT did not invoice Hapag for the bunkers delivered to the M/V SANTA ROBERTA. (*Id.* Ex. 7, Tr. 69:9-14 & 128:24 – 129:10; Ex. 8, Tr. 38:6-10; Kock Decl. ¶ 20.)

146. On October 20, 2014, OW USA issued an invoice to OW Germany for the supply of bunker fuel to the M/V SANTA ROBERTA. (Heilig Decl. Ex. 25.) (OWG 36)

147. On October 20, 2014, OW Germany issued an invoice to Hapag in the amount of \$1,495,860.94 for the supply of bunker fuel to the M/V SANTA ROBERTA. (*Id.* Ex. 24.)

148. On or about November 6, 2014, Hapag remitted payment to OW Germany in the amount of \$1,495,860.94 for the bunkers supplied to the M/V SANTA ROBERTA. (*Id.* Ex. 7, Tr. 65:10-15 & 73:3-14; Ex. 27.)

Dated: New York, New York
May 13, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2016, I caused the foregoing document to be filed on the Court's CM/ECF System for electronic service on all counsel of record in this action.

/s/ Justin M. Heilig